United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1601

To be argued by
ZACHARY W. CARTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1601

UNITED STATES OF AMERICA,

Appellee,

—*against*—

FRANK BYRNES,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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FOR THE SECOND CIRCUIT

Docket No. 76-1601

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK BYRNES,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Frank Byrnes appeals from a judgment entered on December 9, 1976, in the United States District Court for the Eastern District of New York (Edward R. Neaher, J.), convicting him, following a jury trial, of each count of a seven count indictment which charged a conspiracy to distribute cocaine, in violation of Title 21, United States Code, Section 846, and the substantive offenses of possession with intent to distribute and distribution of cocaine, on three separate occasions (December 26, 1974; January 10, 1975 and January 30, 1975), in violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2. Appellant was sentenced to two years imprisonment on each of the seven counts, to run concurrently, and a

special parole term of five years. Execution of the sentence was stayed pending appeal.[1]

On appeal, appellant challenges the sufficiency of the evidence and, in addition, claims that the trial judge erred in "excluding" from evidence appellant's passport.

Statement of Facts

A. The Government's Case

Appellant and co-defendant Carlos Burgos were charged in a seven count indictment with conspiring, between December 6, 1974 and January 30, 1975, together and with one David Dait, an unindicted co-conspirator, to distribute cocaine (Count One). The indictment also charged appellant and Burgos with the substantive offenses of distributing and possessing with intent to distribute cocaine, on December 26, 1974, January 10, 1975, and January 30, 1975 (Counts Two through Seven).

David Dait testified as a witness for the government.[2] From his testimony and the testimony of an undercover police officer, Detective Bernard Sierra, and a surveillance police officer, Detective Michael Golub,[3] the following facts emerged:

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[1] Appellant was tried together with co-defendant Carlos Burgos, who was also convicted of each of the counts in the indictment. Burgos was sentenced on March 4, 1977 to five years probation as a youthful offender, pursuant to Title 18, United States Code, Section 5010(a), after having completed a sixty day observation and study ordered pursuant to Section 5010(e). Burgos has not appealed his conviction.

[2] David Dait pled guilty to one count of distributing cocaine. He was sentenced to five years probation as a youthful offender.

[3] Detective Golub's name is spelled incorrectly throughout the trial transcript as "Gallope."

David Dait and Carlos Burgos were life-long acquaintances, having grown up in the same neighborhood in Queens, New York (33).[4] During the summer of 1974, Dait met appellant who came to work as a disc jockey in an establishment called the "Tune Timer's Bar," where Dait was then working as a bartender. Eventually, Dait, Burgos and appellant began to "get high together," smoking hash and snorting "coke". (34). Dait testified that on one occasion when they (appellant, Burgos and Dait) were alone together in the bar, he heard appellant state "If you ever want any coke to let me know, but don't let anyone know where you are getting it from." (35). At the time, Dait believed that appellant was speaking to both himself and Burgos (36),[5] and in December of 1974, he and Burgos had occasion to take appellant up on his offer (36).

In early December, 1974, Dait was contacted by a person named Teddy Berkowitz with whom he had had previous dealings in marijuana and cocaine (39). As a

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[4] The pages of the transcript of the first day's proceedings, September 27, 1976, are numbered 1 to 179. Starting with the transcript of the second day's proceedings, September 28, 1976, the page numbers begin again as "A-1, A-2, etc.," (Although eventually the "A" is dropped) through page 138. The transcript of September 29, 1976 also begins at page 1 but this time the sequence continues through the end of the trial. Hereinafter, references to page numbers alone, e.g. (33), are to the transcript of September 27, 1976, references to page numbers with an "A" prefix, e.g. (A-33), refer to the transcript of September 28, 1976 and references to page numbers with a "B" prefix refer to transcripts beginning with September 29, 1976 and continuing through the end of the trial.

[5] But Dait later indicated that the connection primarily belonged to Burgos, and that, indeed, their decision to share the proceeds of the cocaine transactions equally, after the first transaction, was based on the fact that he (Dait) had the customer and Burgos had the connection (45, 49).

result of his conversation with Berkowitz, Dait contacted Burgos and advised him that he (Dait) had a friend who wanted to buy some cocaine. Burgos told Dait that he would "get back" to him in a couple of days. Burgos did in fact contact Dait and informed him that he had a sample of cocaine for Dait's friend (40). Shortly thereafter, Burgos and Dait traveled to Berkowitz's home and gave Berkowitz the sample of cocaine. Berkowitz informed Dait that if his friend liked the sample, he would contact Dait again (40-41).

Between December 6 and December 26, 1974, Berkowitz called Dait and told him that his friend liked the sample and wanted to buy two (2) ounces of cocaine. Dait, in turn, called Burgos and related what he'd learned from Berkowitz. Burgos advised Dait that he would see what he could do (42). On December 26, 1974, Burgos called Dait and told him that he had two ounces of cocaine. Dait met Burgos at Burgos' home on Kissena Boulevard, Queens, where Burgos showed Dait the cocaine. Burgos then drove Dait back to Dait's house on Bowne Street, Queens, where he dropped off Dait and left him with the cocaine (42). Dait then called Berkowitz to inform him that he (Dait) had the cocaine. Berkowitz told Dait that he would make the necessary arrangements and call back (42).

Berkowitz called Dait later that evening and advised him that he would be bringing his friend to Dait's house in about a half hour (43). Unbeknownst to Dait, however, Teddy Berkowitz was then an informant for the New York Drug Enforcement Task Force, and Berkowitz's "friend" was Detective Bernard Sierra.

At approximately 9:00 p.m. Berkowitz and Sierra arrived at Dait's house, where Berkowitz introduced Sierra to Dait (43, A-108). Berkowitz immediately excused

himself, ostensibly to check on Sierra's car, but actually to create a situation where Sierra and Dait would necessarily deal directly with each other (A-108-A-109).[6] After Berkowitz had left, Dait showed Sierra the cocaine. The undercover agent then gave Dait $2900 for the narcotics and departed (44).

Shortly thereafter, Dait took the money to Burgos' house, and there he and Burgos separated out $700 and split it between themselves (45). Burgos next suggested that they "go take a ride" to drop off the balance of the money. The pair then drove to the home of appellant located at 56-23 Van Cleef Street, in Queens. When they arrived, Dait saw Burgos give appellant some money, and Burgos and appellant had a conversation in Spanish, which Dait did not understand (46).

About one week later, Sierra called Dait and asked whether or not there was any cocaine available. Dait advised Sierra to call back in a few days. Dait then called Burgos and told him that Sierra wanted two more ounces of cocaine. Burgos replied, "Okay, I'll try to get it." (A-145).

On January 10, 1975, Burgos picked up Dait at Dait's house and they drove together to appellant's house. When they arrived, Dait remained in one room while Burgos and appellant went to another. Shortly thereafter, Burgos and appellant returned to Dait, and Dait and Burgos left appellant's house (47). Burgos then drove Dait back to Dait's house, and on the way gave Dait two (2) ounces of cocaine (48).

Later that same day, Sierra called Dait and told him that he would be coming to Dait's house at 3:00 p.m.

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[6] In fact, on that same day, Sierra obtained Dait's phone number so that he could contact Dait directly (44).

Accordingly, a few minutes after 3:00 p.m., Sierra arrived at Dait's house under the surveillance of Detective Michael Golub and other agents (48, A-112, A-160). Dait escorted Sierra through a hallway to his bedroom where he produced the two ounces of cocaine and told Sierra that "his man" was coming with a scale (48, A-113). Sierra left momentarily to retrieve a cocaine testing kit from his car and returned. Dait then placed a phone call to Burgos at his job at the Brett Glass Co. (48). Sierra, who observed Dait making the call, heard Dait say over the phone "Hurry up over with the scale. The man is here." (A-114). About ten to fifteen minutes later, Burgos arrived and gave Dait the scale (48). After the drugs were weighed, Sierra handed $2900 to Dait in exchange for the cocaine (49, A-114). Before leaving, the undercover agent asked Dait whether he could obtain as much as a pound of cocaine. Dait told Sierra that his man "Frank" could "do anything he wants to. He has an import business." (A-114). Immediately after Sierra left, Sierra phoned the surveillance team that someone else was in the house who had just brought over a scale (A-114). Shortly after receiving Sierra's message, Detective Golub observed Burgos leaving Dait's house and entering a van which was registered to the Brett Glass Co. where Burgos worked (A-161).

At approximately 4:30 or 5:00 p.m. on that same afternoon, Burgos picked up Dait and together they drove to Burgos' house. There, they separated out $2200 for the "connection" and split the balance equally between themselves (49). Afterwards, Burgos suggested that they "go take a ride" and they then drove to appellant's house. After they arrived and had "smoked a joint" with appellant, Burgos and appellant left the room for a few moments and then returned (49). Subsequently, Burgos and Dait left the house.

On January 22, 1975, Sierra appeared at Dait's house without warning. Sierra inquired about obtaining more cocaine, but Dait advised him that "nothing was happening right now." (50). Dait stated, however, that he was going to see his friend later and that they would "see if they could get anything." (50). Sierra suggested to Dait that he call his connection to see if there was any cocaine available (50, A-117).[7] Acting on Sierra's suggestion, Dait placed a call to appellant but there was no answer (50). Sierra memorized the telephone number Dait dialed and later recited it to Golub, who recorded it (163).[8] After placing the call, Dait advised Sierra that there was no answer and suggested that he call back in a few days (51). Sierra then left and joined the surveillance which was in the area.

At approximately 4:55 p.m. Burgos arrived at Dait's house (51, A-119, B-164), after which Dait exited his residence and entered Burgos' car. Following the vehicle, Golub and Sierra observed the car park across from 5623 Van Cleef Street. Dait and Burgos exited the auto and walked to the door of the building, where they remained for a very short time before they returned to the car and left because appellant was not at home (A-120-122).

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[7] Sierra testified that he purposely made the suggestion in hopes that he could memorize the telephone number which was dialed.

[8] It was later stipulated that the number 699-0767, belonged to a phone which was installed at 5623 Van Cleef Street during the period between December 26, 1974 and January 30, 1975. It was further stipulated that appellant resided at that address during that same time period (B-156-157). Sierra further testified that he learned from the telephone company that the name of appellant, Frank Byrnes, appeared on the line card for telephone number 699-0767 along with the subscriber, Victor Avendano. (B-136).

In the days following January 22, 1975, Sierra made periodic telephone calls to Dait to find out whether or not more cocaine was available (A. 121). Eventually on January 30, 1975, at about noon, Sierra visited Dait's residence and received a sample of cocaine, which Burgos had given to Dait on the 29th. Dait advised Sierra that he could obtain more cocaine for him later. He further stated that he was going to meet his partner and go to his connection's home. He told Sierra to return at about 3:00 P.M. (53, A. 122).

After Sierra left Dait attempted to call Burgos at home but was unable to reach him. Finally, learning through mutual friends that Burgos was at a location on Main Street in Queens (53), Dait left his house and caught a bus to Main Street to find Burgos. Dait located Burgos and advised him that Sierra wanted more cocaine. Burgos and Dait then drove to appellant's home.

At the house, as they had done before, appellant and Burgos left Dait and went into a separate room, leaving Dait alone. They returned momentarily, and shortly thereafter Burgos and Dait left (53-54) and drove back to Dait's residence (53-54). On the way there, Burgos gave Dait two ounces of cocaine in separate one ounce bags (54). On arriving at Dait's house, Burgos and Dait left the car and went inside. Sierra who was in the area, received a radio communication that Dait and Burgos had entered Dait's residence. Sierra immediately proceeded to Dait's house in an effort to get inside before Burgos left. (A. 122).

When Sierra entered the house, he saw Burgos in the hallway and he passed him on his way to Dait's room (A. 122). Sierra asked Dait who the male was, and Dait answered "that's my partner." Sierra asked, "Is that Carlos?", to which Dait replied, "Yes." (A. 123). Sierra then proceeded to purchase one of the ounces of cocaine

from Dait for $1,500. and left Dait's residence (123). About fifteen to twenty minutes later, Burgos returned to the house and received from Dait $1,300. and the other ounce of cocaine (54-55). A short time later, Burgos left Dait's residence, entered his car, and left the area.

B. The Defense Case

Appellant took the witness stand in his own behalf. In substance, he denied that he had ever sold or possessed, or conspired to sell or possess, cocaine with Burgos or Dait (B-290-~~291~~ 316). He further stated that he had never traveled to Peru and had not been in South America at all since 1962 (273-274). Appellant did not offer his passport in evidence at this juncture, although he said he had intended to do so earlier. Appellant admitted that he had previously been convicted of possession of marijuana (288). He also stated that he had once been given a small quantity of cocaine, although he did not use cocaine. He could not remember who had given him the cocaine (307). Appellant stated that he regularly associated with Burgos and Dait on a social basis, but he was unaware of Dait's use of or dealing in narcotics (286).

Finally, appellant claimed that he had sold cassette tapes to Burgos on a number of occasions, and suggested that if anyone saw Burgos give him any money, it was probably in payment for those tapes.

Appellant's co-defendant Burgos also took the stand in his own behalf. He claimed that he was Dait's "partner" in a venture he had developed in which they would sell as scrap what was left of aluminum window frames which his employer allowed him to keep in connection with his job (245-246). Burgos also claimed that he purchased cassettes from appellant and suggested that if Dait saw him pay money to appellant it was in connection with purchasing cassettes (253-254).

ARGUMENT

POINT I

The Court Properly Excluded Appellant's Passport When Appellant Sought to Offer the Passport in Evidence.

In an effort to establish that he had never traveled to Peru, without any testimonial foundation, appellant offered a United States passport which had purportedly been issued to him and which bore no stamps or entries indicating that he had left the United States and traveled to Peru. Appellant offered the passport during his cross-examination of Detective Sierra.[9] The Government objected to its admission and the side bar colloquy which followed is set forth in its entirety (A. 128):

> The Court: What is the purpose of this?
>
> Mr. Rapaport: To show that he was never in Peru, the testimony given was—by Dait was that he had been in Peru and may have been in Florida.
>
> The Court: How do we know he was never in Peru under this passport or some other passport?
>
> Mr. Rapaport: If he was in Peru——
>
> The Court: If you want to put him on the stand, that is one thing. You won't get it in this way.

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[9] Detective Sierra testified before the Grand Jury that David Dait had boasted on January 10, 1975, in the context of a discussion about his ability to obtain large quantities of cocaine, that "his man Frank" made trips to Peru. The "Peru" statement was not central to the Government's case, and appellant was not indicted for the importation of narcotics. Indeed, neither the Government's opening statement, the direct testimony of any of the Government's witnesses nor the Government's summation made even a passing reference to any foreign travel by appellant. Nevertheless, appellant himself raised the issue during his cross-examination of Detective Sierra (A. 126).

Mr. Carter: His passport, Your Honor—this is not probative of that point, number one.

Number two, this witness [defendant's] passport cannot be brought in through this witness.

Number three, I could bring in my own passport and I just traveled in Europe and my passport was not stamped with the specific countries I visited.

Mr. Rapaport: If Your Honor please, this is a passport that United States Citizens are——

The Court: It is not proof of that proposition and it is certainly not evidence of it. You cannot do it that way.

Mr. Rapaport: *When I put him on the stand, I'll have to do it. I'll do it that way.*

And after the proceedings had presumed and in the presence of the jury:

Mr. Rapaport: I will withdraw that question, if Your Honor please, *and I will bring that matter on at a future time before the jury.* (A. 129) (emphasis added).

Whereupon, appellant's counsel resumed cross-examination without further comment from the court. Clearly, Judge Neaher's ruling was directed primarily at the issue of whether the passport could be offered through the witness who was then on the stand, Detective Sierra. While the court expressed some reservations about the competency of the passport to prove what it was offered to prove, the court, after appellant's counsel expressed his clear intention to do so, did not preclude the admission of the passport at a later time through another witness. Appellant subsequently took the stand, but his passport was never offered.

Now on appeal, appellant contends that he was improperly precluded from introducing the passport and that the passport was relevant and competent evidence. The claim is totally without merit, for appellant's passport was not, standing alone, competent to establish that appellant did not travel to Peru. Moreover, appellant never availed himself of the opportunity to properly introduce the passport into evidence.

In *United States* v. *Weiss*, 491 F.2d 460 (2d Cir.), *cert. denied*, 419 U.S. 833, 95 S.Ct. 58 (1975), Judge Mansfield, writing for this Court, addressed precisely the same issues which are raised in appellant's claim, namely: (1) whether a United States passport may be admitted without testimonial authentication and (2) whether such a passport alone is competent evidence to prove that a defendant did not travel outside of the United States. In *Weiss*, the defendant was charged with membership in a narcotics conspiracy, and at issue was whether he had been present at conspiratorial meetings which had taken place in Bangkok, Thailand. At trial, the defendant offered, without any testimonial foundation, two United States passports which bore no stamps or entries indicating that the bearer of the passports (Weiss) had been in Thailand during the relevant time period. The trial court excluded the passports on the ground that they had not been authenticated properly.

In appealing his conviction, Weiss argued that the trial court erred in excluding the passports. In substance, he contended that a passport was self-authenticating since it was either an "official record" or an "official publication thereof," as defined in Rule 44(a), F.R.Civ.P., as made applicable to criminal proceedings by Rule 27, F.R.Cr.P.[10]

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[10] Rule 44(a) now applies to criminal proceedings through Rule 901 of the Federal Rules of Evidence.

However, in affirming Weiss conviction, the court squarely rejected the notion that a passport is an "official record." Judge Mansfield pointed out that the passport is kept in the custody of the citizen to whom it is issued, and therefore does not satisfy the requirement of Rule 44(a) for an official record that the document be "kept within the United States" and be in the "custody" of an officer of the government. *Weiss, supra* at 465. The court further held that the passport could not be admitted as an "official publication" of a public record since it was not offered simply to prove matters of record within the Department of State, such as citizenship, birth, etc., but rather whether the defendant had traveled abroad. The court stated that the passport would be competent for that purpose "only upon introduction of proof by authorities of Thailand that if Weiss had entered or left that country during the relevant period, entries would surely have been placed upon the passports." *Weiss, supra*, at 466.

Here, the trial judge correctly followed *Weiss* and ruled that appellant could not offer the passport into evidence in the manner in which he sought. Of course, appellant was free to present the sort of testimony, outlined in *Weiss*, which would have enabled him to have the passport admitted in evidence. Nevertheless, he did not do so. He cannot now be heard to complain.

Appellant's reliance on *United States* v. *Snow*, 517 F.2d 441 (9th Cir. 1975); *United States* v. *Pugliese*, 153 F.2d 497 (2d Cir. 1946), and *United States* v. *Schipani*, 289 F. Supp. 43 (E.D.N.Y. 1968), is entirely misplaced. To the extent appellant cites them, these cases simply voice the familiar rule that evidence which is relevant is generally admissible at a trial. With this general proposition we could hardly argue. The point is, however, that relevance is not the issue here. Appellant's passport was

excluded by the court, not because it was irrelevant, but because the defense did not lay a proper testimonial foundation for its admission in accordance with fundamental rules of evidence. *Weiss*, *supra*. Appellant's argument is frivolous.[11]

POINT II

There Was Sufficient Evidence to Support Appellant's Conviction.

Appellant contends that the court erred in denying his motion to dismiss the indictment, on the ground that the Government's evidence was insufficient as a matter of law. Essentially, he argues that in the absence of testimony that a witness actually saw appellant in possession of cocaine or that he had a conversation about cocaine with appellant contemporaneous with an actual transaction, there was insufficient evidence to support a jury's finding of guilt. Appellant's contention totally ignores the probative value of circumstantial evidence and is wholly without merit.

Viewing the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80

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[11] Appellant surrendered his passport to the United States Attorney as a condition of his release on bail. However, "Custoday" in the context of Rule 44(a) clearly means custody by the official having "legal custody of the record" and in the case at bar that would be the Secretary of State, not the Attorney General. Rule 44(a)(1) F.R. Civ. P.

We note only in passing that had the passport been admitted, it might have proved either that Dait was lying about appellant's trips to Peru, or that appellant had lied to Dait about making such trips. Either way, one can hardly argue, as appellant does, that the passport was an important piece of evidence, at best it was of marginal relevance.

(1942); *United States* v. *Marrapese*, 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974), it is clear that there was more than sufficient evidence on the basis of which a reasonable juror could have found appellant guilty. *United States* v. *Rivera*, 513 F.2d 519, 528-530 (2d Cir.), *cert. denied*, 423 U.S. 948, 96 S.Ct. 367 (1975); *United States* v. *Freeman*, 498 F.2d 569, 571 (2d Cir. 1974); *United States* v. *Taylor*, 464 F.2d 240, 243-245 (2d Cir. 1972); *United States* v. *Falcone*, — F.2d —, Slip op. 345, 350-351 (2d Cir. November 1, 1976).

David Dait testified that appellant had approached Carlos Burgos and himself with the proposition that he (appellant) would supply them with cocaine to sell to customers whom he did not care to meet (35). Dait understood that the offer was made primarily to Burgos, and, indeed, that understanding formed the basis for the division of the proceeds from subsequent cocaine transactions.

When in early December, 1974, Teddy Berkowitz asked Dait whether or not he could obtain some cocaine, Dait contacted Burgos. Burgos produced a sample of cocaine for Dait and Berkowitz. On December 26, 1975, Burgos supplied Dait with two more ounces of cocaine to be sold to Berkowitz' "friend" (42). On that same day, after Dait had sold the cocaine to the undercover police office, Sierra, Burgos joined Dait to divide the proceeds from the sale. Dait testified that they "split" $700 between themselves and that afterwards Burgos suggested *that they "go take a ride" to drop off the remaining $2200* (45-46). Dait testified that Burgos drove them to the home of appellant and that he saw Burgos hand appellant a sum of money (46).

Not long after the sale of December 26, 1974, Detective Sierra asked Dait to obtain more cocaine. Again,

Dait contacted Burgos, and Burgos advised him that he would try to get the cocaine. On January 10, 1975, Burgos and Dait traveled to appellant's home. Dait testified that Burgos and appellant met together briefly in another room and that he (Dait) left with Burgos shortly thereafter. On the way back to Dait's house, Burgos gave Dait two more ounces of cocaine (48). Dait sold the two ounces of cocaine to Sierra for $2900. *On this occasion, Sierra asked Dait if he could obtain a pound and Dait replied that his man "Frank" could get any amount he wanted.* Afterwards Burgos and Dait met again to divide the proceeds of the sale. As before, they separated out $2200 for the "connection" and divided the balance between them, and as on the previous occasion, they went to appellant's house with the "connection's" money (49). Burgos and appellant met, as before, in another room and conferred in Spanish before returning to Dait.

On January 22, 1975, Detective Sierra payed a surprise visit to Dait and asked him to obtain some cocaine; Sierra told Dait to call his connection and Dait acted upon his suggestion (50). Sierra memorized the number which Dait dialed, and it was subsequently determined, and ultimately conceded, that the telephone was installed at house where appellant resided. Dait told Sierra that he and his partner were going to visit his connection to ascertain whether they could obtain cocaine. Later that afternoon, surveillance officers saw Burgos pick up Dait and observed the pair as they traveled to appellant's home.

On January 29, 1975, Dait obtained another sample of cocaine from Burgos which he gave to Sierra on January 30th. Dait advised Sierra that he would arrange to obtain cocaine for him later that afternoon. Later, Dait located Burgos, advised him that he needed more cocaine, and they drove to appellant's house. Once again

Burgos and appellant left Dait and met in another room. After Burgos and Dait left appellant's house, Burgos, as on previous occasions, gave Dait two ounces of cocaine. Later that day, Dait sold part of the cocaine to Sierra.

Appellant relies on *United States* v. *Cimino*, 321 F.2d 509 (2d Cir. 1963), *cert. denied*, 375 U.S. 974, (1964), for the proposition that a mere meeting is not evidence of a conspiracy where no witness overheard the defendant's conversations or saw anything pass from the defendant to another person. The case at bar is readily distinguishable. First of all, Dait was present when appellant initially proposed the scheme to supply Burgos and Dait with cocaine. Secondly, unlike the situation in *Cimino*, where testimony placing the defendant at a single meeting was largely uncorroborated, in this case the evidence established repeated similar conduct which tended to prove that appellant was the source of the cocaine and the recipient of the lion's share of the proceeds.

In *United States* v. *Lubrano*, 529 F.2d 633 (2d Cir. 1975), this Court, confronted with like evidence of repeated similar conduct, stated that "the events of any particular day in isolation from all the rest may be inconclusive, but taken together, the jury could properly have found" the defendant on trial supplied the cocaine. Id. at 636. See also *United States* v. *Rizzuto*, 504 F.2d 419 (2d Cir. 1974). As Judge Neaher properly charged the jury, "circumstantial evidence, if believed, is of no less value than direct evidence." And it is well settled that circumstantial evidence need not exclude all possible inferences but those of guilt. *Lubrano*, *supra* at 636; *United States* v. *Woodner*, 317 F.2d 649 (2d Cir.), *cert. denied*, 375 U.S. 903 (1963).

Here, the overwhelming circumstantial evidence compelled the conclusion that appellant was the source of the

cocaine purchased by Sierra and that he was at the top of the chain of distribution which included Burgos and Dait. Despite appellant's efforts to insulate himself, there was clearly sufficient evidence for the jury to conclude beyond a reasonable doubt that appellant was guilty of the offenses charged.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK } ss

BARBARA ALLEN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 11th day of April 1977 he served a copy of the within

2 cys of the Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Robert Rappaport, Esq.

302 East 72nd Street

New York, New York 10021

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Barbara Allen
BARBARA ALLEN

Sworn to before me this

11th day of April 1977

Carolyn N. Johnson

CAROLYN N. JOHNSON
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Qualified in Queens County
Commission Expires March 30, 1979